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The post-*Tsilhqot'in* world: Court rejects First Nation's assertion of Crown obligation to negotiate and settle litigated claims

In one of the first British Columbia decisions to consider whether new or enhanced obligations flow to the Crown from the Supreme Court of Canada's decision in *Tsilhqot'in Nation v. British Columbia ("Tsilhqot'in")*,[1] the British Columbia Supreme Court flatly rejected a claim in *Sam v. British Columbia*[2] that *Tsilhqot'in* had created a legal duty on the Crown to negotiate in good faith a resolution of a disputed legal claim by proffering a "reasonable" settlement offer.

The Songhees First Nation sought an order from the Court that as a result of the *Tsilhqot'in* decision that the Crown was now required, as a matter of law, to negotiate in good faith with them and make a "reasonable" settlement offer to resolve a pending lawsuit for alleged breaches of Treaty rights that the Songhees filed against the federal and provincial governments. It was asserted that this new duty flowed from the "honour of the Crown." The federal government was prepared to negotiate, but the provincial government disputed its legal liability and did not wish to join in settlement negotiations or make an offer to settle. The Songhees First Nation advanced the proposition that the duty to consult with First Nations now included the duty to negotiate the resolution of a legal action outside of the court system, particularly when the costs of proceeding to trial were prohibitive to the First Nation. This enhanced duty included the obligation to make "reasonable" offers of settlement.

[1] 2014 SCC 44

[2] 2014 BCSC 1783

The Songhees First Nation sought to enforce this alleged obligation in the courts, but the Court confirmed that the Crown's obligations in the post-*Tsilhqot'in* world does not extend this far and dismissed the Songhees First Nation's application.

The result is not surprising. The imposition of a duty on governments to negotiate to "reasonable" resolution all disputes with First Nations when the parties may have wildly differing views on their legal liability would be fraught with challenges. It would, in essence, require the federal or provincial governments to forfeit their right of access to the courts as the ultimate arbiter of disputes. The difficulty of enforcing a right to a settlement offer and how "reasonableness" would be determined in the absence of an ultimate court ruling on liability cannot be understated. What is "reasonable" to one party, may be wholly unreasonable to the other. It is highly desirable that governments and First Nations do attempt to resolve claims and reconcile differences outside of the court system; however, to force the Crown to negotiate to resolution every legal dispute with First Nations by making "reasonable" settlement offers as part of the honour of the Crown would create a lop-sided scheme that would neither be fair nor balanced.

The *Sam* decision does demonstrate that First Nations will use the *Tsilhqot'in* decision to creatively attempt to advance their legal interests, both in and out of the courts, and that the courts will continue to be faced with novel interpretations of the decision for many years to come.

by Joan M. Young and Melanie Harmer

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a cautionary note

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